

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 55632-1-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
ALLEN JEFFERSON,)	
)	
Appellant.)	FILED: <u>June 12, 2006</u>

PER CURIAM—Allen Jefferson appeals his conviction for delivery of cocaine. He claims the evidence was insufficient to support his conviction because of inconsistencies in the testimony of the State’s witnesses. Jefferson also claims the prosecutor engaged in misconduct in closing argument by improperly expressing his personal opinions. We reject these claims. The testimony of the witnesses was consistent with respect to the facts relevant to the crime of delivery of cocaine. And the prosecutor’s argument was not an expression of personal belief, but a permissible argument based on the evidence. We affirm.

Facts

On June 22, 2004, the King County Sheriff’s Department conducted a

“buy and slide” operation in the White Center area. In a buy and slide operation, the police generally employ a confidential informant or undercover officer to buy drugs from street-level drug dealers and arrest the seller sometime after, but not immediately after, the purchase.¹ At about 7:00 p.m. on June 22, 2004 several King County police officers drove to White Center in two vehicles. Detective Turney-Loos drove in a van with Fred Flye, the confidential informant. When they arrived at White Center, Detective Turney-Loos searched Flye and gave him money to purchase drugs.

At trial, Flye testified that when Detective Turney-Loos let him out of the van, he walked north toward an intersection. Before he reached the intersection, he approached Jefferson, who was wearing sky blue Carolina athletic wear, and “[a]sked for a 20.” Jefferson gave him three small rocks of cocaine. He returned to the van and gave the cocaine to Detective Turney-Loos.

Detective Turney-Loos was parked approximately a half block south of the intersection. He testified that he watched Flye approach Jefferson. He saw Jefferson and Flye speak to each other for a few moments and then saw “hand to hand” contact. Then Flye returned directly to the van and handed Detective Turney-Loos what appeared to be cocaine.

The two other detectives involved in the investigation, Detective Cox and Detective Smith, parked further away, approximately a block and a half from the intersection. Detective Cox testified that he watched Flye walk north toward the

¹ This is in contrast to a “buy-bust” operation where the seller is arrested immediately after the exchange occurs.

intersection and approach a group of people. Jefferson, wearing light blue clothing, was among the group. He saw Jefferson reach into his pocket and then saw a “hand-to-hand exchange” between Jefferson and Flye. Detective Smith testified that he saw the informant contact Jefferson who was wearing “Carolina Blue.” Jefferson and Fly appeared to be talking to each other, but he did not see an actual exchange.

Jefferson was charged with delivery of cocaine. Following a two-day trial, a jury convicted him as charged. The court imposed a Drug Offender Alternative Sentence.

ANALYSIS

Sufficiency of the Evidence

Jefferson contends the evidence was insufficient to establish the elements of delivery of cocaine. This court reviews a claim of insufficiency of the evidence to determine whether, viewing evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501;

Salinas, 119 Wn.2d at 201. We defer to the trier of fact for purposes of determining credibility, resolving conflicting testimony, and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005) rev. denied, 156 Wn.2d 1029, 133 P.3d 484 (2006); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In order to prove that Jefferson was guilty of delivery of a controlled substance in violation of RCW 69.50.401 (a)(1) (i), the State had to prove that Jefferson (1) delivered a controlled substance, (2) with knowledge that the substance delivered was a controlled substance. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

Jefferson claims the evidence was insufficient to establish he delivered cocaine to Flye because while two of the police officers testified that they saw hand-to-hand contact, they did not see Jefferson place drugs in Flye's hand. But Flye testified that he gave Jefferson money in exchange for cocaine. And Detective Turney-Loos testified that he searched Flye beforehand, he gave Flye the money to purchase the drugs when Flye left the van and Flye returned with the cocaine. Detective Turney-Loos also testified that Flye had no contact with any person outside the van other than Jefferson. The clear inference from the testimony is that Jefferson sold the cocaine to Flye.

Jefferson also claims there was no evidence of knowledge. But Flye testified that when he asked for "a twenty," a slang term for twenty dollars worth of cocaine, Jefferson sold him cocaine for twenty dollars. A rational trier of fact

could conclude from this testimony that Jefferson knew he was delivering cocaine.

Jefferson also points out various inconsistencies in details recounted by the State's witnesses. But none of the inconsistencies cited by Jefferson are related to elements of the crime. For instance, he claims the testimony was inconsistent regarding how many other people were in the vicinity. But while the officers appeared to have different recollections about the number of people present on the street, they all testified that their attention was focused on Flye and they all said they saw Flye have contact only with Jefferson.

Jefferson also contends Detective Turney-Loos was not credible because he changed his testimony. Detective Turney-Loos first testified that Flye gave him loose, unpackaged rocks of cocaine. But when the Detective was asked to identify the cocaine and saw that there was a small piece of plastic wrapping with the cocaine, he acknowledged that he must have forgotten about it. The jury was entitled to evaluate Detective Turney-Loos' testimony and decide whether it called into question the chain of custody of the evidence.

Likewise, Jefferson claims there was a disparity between the amount of money given to Flye and the amount of drugs procured. According to the testimony, .2 grams of cocaine generally has a street value of about \$20. However, in this case the cocaine purchased by Flye for \$20 weighed only .073 grams. But again, this alleged discrepancy does not relate to any element of the crime. Flye testified that he was aware the rocks Jefferson gave him were small,

but because his purpose was to obtain any amount of drugs, he was not concerned with the fairness of the transaction. The State was only required to prove that Jefferson delivered drugs, and not that the value of the drugs equaled the value of the money exchanged.

We conclude that a rational trier of fact could have found that the State proved the elements of delivery of cocaine beyond a reasonable doubt.

Prosecutorial Misconduct

In closing argument, the prosecutor told the jury that if they found each element of the crime had been proved, it “must return a verdict of guilty.” The prosecutor also argued: “So, each of those elements is proven beyond a reasonable doubt and as such I believe that it is your duty to return a—verdict of guilty.”

Jefferson contends that this argument was an improper expression of the prosecutor’s personal opinion and was misconduct.

A defendant who alleges improper conduct on the part of a prosecutor must establish both that the prosecutor’s conduct was improper and that it had a prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Any allegedly improper statements must be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In closing argument, the prosecutor commits misconduct if it is clear and

unmistakable that he or she is not arguing an inference from the evidence but is expressing a personal opinion. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672.

Where, as here, there was no objection to the argument below, the claim of error is waived unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wn.2d at 561. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

While the better practice is to refrain from phrasing arguments in terms of "I believe," the gist of the State's argument was that the evidence established the elements of delivery beyond a reasonable doubt. The argument was based on the evidence and jury instructions, and not on the prosecutor's personal opinion.

Jefferson also suggests the prosecutor improperly urged the jury not be "distracted" and thereby minimized the significance of the burden of proof and the presumption of innocence. However, viewed in context, the prosecutor made clear that he was urging the jury to focus on the elements of the crime, and not on unsubstantiated claims that confidential informants are professional "evidence fabricators" nor on questions raised that did not relate to the elements

the State was required to prove.²

In his Statement for Additional Grounds for Review, Jefferson claims that Fred Flye should have been tested for drugs before he testified. Jefferson cites no authority, and we do not know of any which would require or authorize a witness to undergo drug testing. In any case, Jefferson availed himself of the opportunity to cross examine Fred Flye about his history of drug use. Jefferson also alleges that his offender score was inaccurate, but he does not explain the error, and we are unable to review his claim.

We conclude the evidence was sufficient to support the delivery conviction and the prosecutor did not engage in misconduct, and affirm.

FOR THE COURT:

Schindler, ACF

Becker, J.

Columan, J

² During his cross examination of one of the police officers, Jefferson referred to confidential informants as “evidence fabricators.”